

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA                   :     CIVIL ACTION  
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                                              :  
                                              :     99-4527  
YVETTE JULBE                               :     (CR 94-0323-07)

**MEMORANDUM AND ORDER**

HUTTON, J.

May 2, 2000

Currently before the Court is Movant Yvette Julbe's ("Movant" or "Julbe") Motion for Relief Under 28 U.S.C. § 2255 (Docket No. 297), the Government's Memorandum in Opposition to Defendant's Petition Pursuant to 28 U.S.C. § 2255 (Docket No. 299), Petitioner's Post-Hearing Memorandum of Law (Docket No. 303), and the Government's Post-Hearing Memorandum of Law (Docket No. 304). The Court heard oral argument from the parties on February 29, 2000. Section 2255 requires the Court to "determine the issues and make findings of fact and conclusions of law . . . ." 28 U.S.C. § 2255. For the reasons stated hereafter, the Court grants Julbe's Motion for Relief Under 28 U.S.C. § 2255.

**I. FINDINGS OF FACT**

1. On August 11, 1994, Julbe was indicted by a federal grand jury on three counts of a twenty-six count indictment.

2. Julbe was charged with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, distribution and possession of

cocaine in violation of 21 U.S.C. § 841(a)(1), and unlawful use of a communication facility in violation of 21 U.S.C. § 843.

3. Julbe entered a plea of not guilty but was ultimately found guilty after an eight day jury trial, which concluded on September 28, 1995.

4. On October 22, 1996, Julbe appeared for sentencing. Although the Presentence Investigative Report assigned Julbe an offense level of 36, the Government and Julbe stipulated to an offense level of 34.

5. Julbe was classified as a Criminal History Category I and was sentenced by this Court to undergo imprisonment for a term of 151 months for violation of 21 U.S.C. § 846.

6. While she was also sentenced to 48 months for violating 21 U.S.C. § 841(a)(1) and 48 months for violating 21 U.S.C. § 843, each 48 month sentence was to run concurrently with her sentence of 151 months for violation of 21 U.S.C. § 846.

7. At no time prior to sentencing did Julbe seek to avail herself to the "safety valve" provision under 18 U.S.C. § 3553(f)(5), by proffering with the Government concerning her knowledge of the drug organization.

8. Julbe's trial counsel did not mention the safety valve provision during the course of the sentencing hearing.

9. When interviewed for the Presentence Investigative Report, Julbe continued to maintain her innocence.

10. Julbe's counsel neither argued for nor sought to produce evidence at sentencing in support of a reduction under Section 3B1.2 of the Guidelines for minimal or minor role in the conspiracy.

11. On October 30, 1996, Julbe met with the agents of the Government for purposes of a proffer concerning her knowledge of the drug organization. She never met with agents of the Government a second time.

12. Julbe filed a direct appeal of her conviction on or about November 1, 1996.

13. On August 11, 1997, the Third Circuit Court of Appeals affirmed in all respects Julbe's conviction.

14. On December 11, 1997, Julbe filed a Motion for Resentencing on All Counts which was subsequently denied by this Court.

15. Julbe made a timely appeal to the Third Circuit Court of Appeals which was subsequently denied.

16. On May 19, 1999, Julbe filed a pro se Motion to Vacate, Set Aside, or Correct Sentence, wherein she alleged that she received ineffective assistance of counsel from Jean Purnell, Esquire ("Purnell"), her trial counsel, in the post-verdict and sentencing phases of her criminal conviction for participation in a drug conspiracy. Julbe alleges that Purnell's assistance was ineffective as she neither advised Julbe of the safety valve

provision nor sought a reduction in the offense level for her minor or minimal role in the cocaine conspiracy. Julbe alleges that Purnell's assistance was constitutionally defective for the following reasons: (1) after conviction but before sentencing, Purnell did not advise her of or assist her in the utilization of the "safety valve" provision of 18 U.S.C. § 3553(f) although she was eligible for the application of the safety valve; (2) Purnell did not seek an adjustment in or the application of § 3B1.2 of the Federal Sentencing Guidelines offense level; and (3) Purnell should have moved for a departure from the Sentencing Guidelines pursuant to U.S.S.G. § 5K2.0 et seq.

17. In a letter dated February 22, 1999, Purnell wrote the following to Julbe:

I believe that I should have raised certain issues at your sentencing hearing and I failed to raise those issues. I also think that I should have insisted that you have a proffer before you were sentenced so that there could be no question that you would be eligible for the Safety Valve. I raised these issues in my brief, but the Third Circuit [i]gnored the issue and the Supreme Court would do the same, in that an attorney cannot argue their own ineffectiveness. . . . Specifically, I suggest that you file a Sec. 2255 Petition, alleging ineffective assistance of counsel. . . . I will not allow a mistake that I made keep you in jail for the next 10 years.

(Letter, Purnell to Movant, 2/22/1999).

18. Several weeks before the Court's February 29, 2000, evidentiary hearing on this matter, Purnell died.

19. As a result of Purnell's death, the parties stipulated at the evidentiary hearing that Julbe was never advised of the safety

valve provision and that Purnell admitted as much in her letter of February 22, 1999. (See Transcript, 2/29/2000 at 46-48; Julbe's Post-Hearing Mem. of Law at 1).

20. At the Court's evidentiary hearing, Julbe testified that Purnell never told her about the safety valve. (See Transcript, 2/29/2000 at 7).

21. Julbe also testified that after she was sentenced, she did not cooperate with the agents of the Government regarding her role in the cocaine conspiracy. (See Transcript, 2/29/2000 at 8).

22. Julbe testified that she was afraid to cooperate with the agents of the Government because she feared that "they were gonna give [her] more time." (See Transcript, 2/29/2000 at 9).

23. Julbe testified that she learned of the safety valve years after her sentencing and was told that the safety valve worked only if she told the truth. (See Transcript, 2/29/2000 at 9).

24. On direct examination Julbe admitted her involvement in the cocaine conspiracy. (See Transcript, 2/29/2000 at 10).

25. Julbe also testified on direct examination that had she known of the safety valve, she would have cooperated with the agents of the Government after her trial concluded but before she was sentenced. (See Transcript, 2/29/2000 at 10-11).

26. At the Court's evidentiary hearing, Julbe acknowledged on cross-examination that she wrote in a letter to this Court, dated

October 17, 1996, that she should have "pleaded guilty" from the beginning. (See Transcript, 2/29/2000 at 12).

27. Julbe acknowledged on cross-examination that she was "hardheaded" and did not want to listen to her lawyer's advice either at or around the time of her trial. (See Transcript, 2/29/2000 at 13).

28. Julbe acknowledged on cross-examination that Purnell repeatedly advised her to plead guilty but she refused. (See Transcript, 2/29/2000 at 13-15).

29. Julbe denied on cross-examination that Purnell advised her to plead guilty at the time the only other defendant on trial pled guilty. (See Transcript, 2/29/2000 at 15).

30. Julbe acknowledged on cross-examination that she was not completely honest to the Court in her letter of October 17, 1996. (See Transcript, 2/29/2000 at 16). In that letter she stated that she was not guilty of all the crimes charged. (See Transcript, 2/29/2000 at 16).

31. At the Court's evidentiary hearing, Julbe acknowledged on cross-examination that she was guilty of all the crimes charged. (See Transcript, 2/29/2000 at 16-17).

32. Julbe acknowledged on cross-examination that she was dishonest and/or non-cooperative with agents of the Government at other times since she was indicted. (See Transcript, 2/29/2000 at 18-30).

33. Julbe made a detailed proffer of her involvement in the cocaine conspiracy. (See Transcript, 2/29/2000 at 30-38).

34. Assistant United States Attorney Jeffrey Whitt ("Whitt") testified at the Court's evidentiary hearing of February 29, 2000. (See Transcript, 2/29/2000 at 49-58).

35. Whitt testified that he was involved in a supervisory capacity at Julbe's trial and was thereafter responsible for the proceedings that led up to Julbe's sentencing. (See Transcript, 2/29/2000 at 49).

36. After Julbe's trial concluded but before sentencing, Whitt met with Julbe, Purnell, and special agent Denise Grant ("Grant"). (See Transcript, 2/29/2000 at 50).

37. Whitt testified that Julbe refused to cooperate with the Government at that time. (See Transcript, 2/29/2000 at 51).

38. Whitt testified that seven or eight days after Julbe's sentencing, he again met with Julbe, Purnell, Grant, and another Drug Enforcement Administration agent concerning the possibility of a proffer. (See Transcript, 2/29/2000 at 51).

39. Whitt testified that it is his habit at proffers to explain to the convicted individual that, inter alia, it is important to tell the truth, that the person's statements will not be used against him or her unless the individual makes contrary statements at a later proceeding, and that the most grave thing

that the individual can do is lie at the proffer. (See Transcript, 2/29/2000 at 52).

40. Whitt recalled that at the proffer, Purnell stressed to Julbe the importance of being truthful. (See Transcript, 2/29/2000 at 53).

41. Whitt testified that while at the proffer, Julbe did not acknowledge her role in the cocaine conspiracy although she provided historical information concerning other dealers. (See Transcript, 2/29/2000 at 53).

42. Whitt acknowledged that he does not recall Purnell ever advising Julbe of the safety valve. (See Transcript, 2/29/2000 at 54-55).

43. Whitt acknowledged that the "standard proffer agreement" neither mentions nor references the safety valve. (See Transcript, 2/29/2000 at 55).

## **II. DISCUSSION<sup>1</sup>**

Rule 4 of the Rules Governing § 2255 Cases in the United States District Courts states in pertinent part that

(a) [t]he original motion shall be presented promptly to the judge of the district court who presided at movant's trial . . . .

(b) [t]he motion, together with all files, records, transcripts, and correspondence relating to the judgment under attack shall be examined promptly by the judge to whom it is

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<sup>1</sup>To the extent that the "Discussion" portion of this decision contains findings of fact and/or conclusions of law in addition to those set forth under such headings, these determinations are deemed to be part of the respective section even if not expressly stated.



assigned. If it plainly appears from the face of the petition and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

28 U.S.C. § 2255, R. 4 (West 1999). Habeas corpus relief is generally available only in "exceptional circumstance" to protect against a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure. See Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 471 (1962); see also United States v. Gordon, 979 F. Supp. 337, 339 (E.D. Pa. 1997).

In considering a habeas corpus petition, conclusory allegations and bald assertions do not provide a sufficient basis for the court to sustain such a petition. See Mayberry v. Petsock, 821 F.2d 179, 185 (3d Cir. 1991). Therefore, movant must proffer factual allegations to support his or her petition. See Phillip v. United States, 183 F.R.D. 424, 426 (E.D. Pa. 1998). Movant must identify specific errors by counsel. See Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992).

A criminal defendant is entitled to reasonably effective assistance of counsel. See U.S. Const. amend. VI. To prevail on a claim of ineffective counsel, movant must demonstrate that counsel's performance was deficient and that the deficient performance was prejudicial. See Strickland v. Washington, 466

U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see also Meyers v. Gillis, 142 F.3d 664, 666 (3d Cir. 1998) (stating that to be entitled to habeas relief, the defendant must establish ineffectiveness as well as resultant prejudice). There are two prongs to the Strickland Court's analysis: (1) whether counsel's performance fell "below an objective standard of reasonableness," thus rendering the assistance so deficient that the attorney did not function as counsel as guaranteed by the Sixth Amendment; and (2) whether counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2064-65, 2068.

The Supreme Court considers "deficient performance" to be "acts or omissions outside the wide range of professionally competent assistance." Id. at 690, 104 S. Ct. at 2066; see also Meyers, 142 F.3d at 667 (stating that representation will not be deemed ineffective unless it fell below an objective standard of reasonableness") (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." United States v. Day, 969 F.2d 39, 42 (E.D. Pa. 1992) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.).

Ultimately, movant must show that within a reasonable probability, had it not been for counsel's unprofessional errors,

the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The court, however, "must indulge a strong presumption that counsel's conduct was reasonable." Frey, 974 F.2d at 358.

### **III. CONCLUSIONS OF LAW**

1. Julbe was and remains eligible for application of the safety valve provision of Title 18, United States Code, section 3553(f).

2. In failing to advise Julbe of the safety valve, Julbe's counsel's performance fell below an objective standard of reasonableness.

3. In failing to advise Julbe of the safety valve, Julbe's counsel's omissions fell outside the wide range of professionally competent assistance.

4. The Court cannot discern a tactical advantage sought by Julbe's counsel that would justify failing to advise Julbe of the safety valve.

5. The assistance provided to Julbe by her counsel was so deficient as to deny Julbe her Sixth Amendment right.

6. The Court is confident that Julbe's current sentence is not equivalent to that which she would have received had she been advised of the safety valve.

7. There is a reasonable probability that but for the ineffective assistance provided to Julbe by her counsel, the result of the proceedings would have been different.

8. Julbe was prejudiced by her counsel's ineffectiveness.

9. Julbe has satisfied her burden to prevail on a claim of ineffective counsel under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

An appropriate Order follows.

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YVETTE JULBE                               :     (CR 94-0323-07)

**O R D E R**

AND NOW, this           2<sup>nd</sup>           day of           May, 2000,           upon  
consideration of Movant Yvette Julbe's Petition for Relief Under 28  
U.S.C. § 2255 (Docket No. 297), the Government's Memorandum in  
Opposition to Defendant's Petition pursuant to 28 U.S.C. § 2255  
(Docket No. 299), Petitioner's Post-Hearing Memorandum of Law  
(Docket No. 303), and the Government's Post-Hearing Memorandum of  
Law (Docket No. 304), IT IS HEREBY ORDERED that Movant Petition for  
Relief Under 28 U.S.C. § 2255 (Docket No. 297) is **GRANTED**.

IT IS FURTHER ORDERED that the Court **SHALL** conduct a hearing  
regarding Movant's Resentencing on Thursday, June 29, 2000 at  
12:30 p.m., Courtroom 9A, 601 Market Street, Philadelphia,  
Pennsylvania.

BY THE COURT:

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HERBERT J. HUTTON, J.